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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted]

FEDERAL TRADE COMMISSION, *Petitioner*

v.

SUN OIL COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

The petition for certiorari (p. 9) states the question presented by describing the decision of the Court of Appeals as holding that the Robinson-Patman Act's meeting competition defense is available to a seller when the seller seeks to enable its buyer to meet the lower price of a competitor of the buyer. This description to some extent begs the question for it assumes the correctness of the petitioner's definition

of "competitor." Put in wholly factual terms, the question presented is whether the Court of Appeals properly held that Sun Oil Company, a "major" marketer of a branded gasoline, when confronted by local price cutting competition on the part of a supplier-retailer of another branded gasoline which causes consumers to turn away from Sun's branded product and reduces the volume of a dealer distributing Sun's product to consumers, was justified in lowering its price to that dealer to meet *that* competition.

The Court of Appeals found that the competition involved in these marketing activities included competition between Sun and the competing supplier-retailer, Super Test, and no challenge is made as to the factual basis for this finding.[1]

ARGUMENT

The unfelicitous language of Section 2 of the Robinson-Patman Act, particularly the meeting competition proviso, required interpretation in its application to the facts of this case. *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231; *Federal Trade Commission* v. *Staley Manufacturing Co.*, 324 U.S. 746. The need to interpret the statute in the context of the problem posed by this case is as plain as it was in *Standard*. The price competition by Super Test essen-

[1] That Super Test was a supplier-retailer as found by the Court of Appeals, is supported by evidence throughout the record before that Court. See, for examples, pages 338 and 494-6 of the Transcript of Record. The Commission appears to have come to a similar conclusion, for it accepted as valid (petition for certiorari, page 7) Sun's contention that it was competing, together with McLean, as one channel of competition, "with other channels of competition", including Super Test, as appears from the context.

tially took away *Sun's* business when Super Test took to itself, whatever the method, McLean's gasoline sales of Sun's product.

The Court of Appeals, in its necessary effort to decide the probable intent of Congress and to reconcile the provisions of the Robinson-Patman Act with the "broader antitrust policies that have been laid down by Congress," *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 74, reached a correct result by following the lines of interpretation and the choice of basic antitrust values endorsed in decisions of this Court interpreting this statute. *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231; *Federal Trade Commission* v. *Staley Manufacturing Co.*, 324 U.S. 746. Thus the Court of Appeals (p. 31a, petition for certiorari) placed emphasis on an individual competitive situation; gave primacy to the health of the competitive process, as against injury to particular competitors; adopted an interpretation which protects the small retailer by preventing widespread, disastrous price wars; and eschewed an interpretation which would foster vertical integration of major refiners and eliminate small independent businesses.

All of this the Court of Appeals' interpretation achieves in addition to the two aims, stated elsewhere in its decision and to which the petition for certiorari confines its attention, viz: promoting competition at the retail level, and providing an opportunity for a major to break away from a uniform pricing system.

The petition for certiorari argues (p. 15) that the interpretation of the Court of Appeals will coerce independents to avoid price competition with the majors.

and that this will further rigidify the price structure of the majors. Nothing in the Court of Appeals decision prevents an independent from initiating price competition. If there should follow what the petition (p. 15) calls "selective price warfare" on the part of a "major", this would be predatory pricing which cannot qualify as good faith meeting of competition and is clearly controlable by the Commission or the Federal Courts. The petitioner's fears as to price rigidity are, however, supportable by the Commission's interpretation, for it requires a major to maintain a rigid price structure throughout its marketing area in the face of local price cuts by an independent, a rigid structure either at the pre-existing major price or at a new lower level. Thus a vaster rigidity, usually followed by a chain reaction of price reductions by other marketers, carrying price war injury to or elimination of independent dealers, is the likely consequence of the Commission's interpretation. *Cf.* Mr. Justice Douglas dissenting in *Standard Oil Company* v. *United States*, 337 U.S. 293, 315.

The assertion in the petition for certiorari (p. 9) that this case presents an important question concerning the meaning of the meeting competition defense, is not supported in the record. The Court of Appeals was at pains to point out that the gasoline dealer is a "rare bird"; that gasoline is marketed in a unique facility, the dealer operated service station; that the dealer, in the words of Mr. Justice Jackson in a dissenting opinion in *Standard Oil Company* v. *United States*, 337 U.S. 293, 323, is a conduit from the oil fields to the driver's tank. The petition argues (p. 14) that in a sense all retail distributors are conduits. But the marketing of gasoline is quite singular in that, unlike

other consumer needs, gasoline is required in the course of mobility over wide areas; it is flammable; it cannot be stored by the consumer; it cannot be stored for long term supply by the dealers; and an assured supply, accompanied by wide consumer acceptance and the availability of related petroleum products, must be maintained by the supplier. The applicability of this decision to the marketing of the generality of consumer goods is not apparent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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